

## **TITLE 15. BOARD OF PRISON TERMS**

### ***STATEMENT OF EMERGENCY***

**RN 04-01**

#### ***ADMINISTRATIVE APPEALS***

NOTICE IS HEREBY GIVEN that the Board of Prison Terms (Board) proposes to repeal Title 15 (Division 2), California Code of Regulations (CCR) sections (§§) 2050 through 2052 and §§ 2054-2056; amend §§ 2072, 2073 and 2074; CCR § 2057 will be amended and renumbered to *new* proposed CCR § 2251.5.

#### **AUTHORITY**

These regulations are submitted pursuant to the Board's authority under Penal Code §§ 3052 and 5076.2.

#### **REFERENCE**

These regulations are amended to implement, interpret, and/or make specific, Penal Code §§ 3041, 5076.2; *Armstrong v. Schwarzenegger* (2002) USDC-ED, Case No. C94-02307, and *Title II, Americans With Disabilities Act of 1990* (ADA), 104 Stat. 337, 42 U.S.C., sections 12101, et seq.

#### **FINDING OF EMERGENCY**

The Board finds that its February 10, 2004, emergency order amending the above sections, is necessary for the immediate preservation of the public peace, health and safety, or general welfare.

While this action repeals the administrative appeals program currently available for all prisoners and parolees affected by Board decisions, both State and federal courts are available to redress all these types of claims. This action eliminates an administrative process that currently duplicates the judicial process. Courts may address these claims more quickly since there are no administrative remedies that need be exhausted. However, the grievance process expressly required under the *Armstrong* Injunction and the Armstrong Remedial Plan II will continue. Thus, current CCR § 2057 concerning the Americans with Disabilities Act will be amended to expand coverage of grievances and moved to new CCR § 2251.5. Other references in Board regulations to appeals are deleted to avoid confusion. These include CCR §§ 2072-2074 concerning the rights of multijurisdictional prisoners].

## **Background**

On July 23, 2003, the federal court in *Valdivia v. Schwarzenegger* [U.S.D.C. E.D. Cal. Case No. Civ. S-94-0671 LKK/GGH] ordered that the Board and the Department of Corrections (CDC) either submit a remedial plan or comply with the court's other orders. The plan submitted to the court, hereafter known as the *Valdivia* Remedial Plan (VRP), creates a significant new workload and a shift of the parole revocation process from CDC to the Board. On December 1, 2003, Justice Karlton issued the "Stipulated Order for Permanent Injunctive Relief," which accepted the proposed VRP. This last order requires that the policies substantially revamping parole revocation be completed and filed with the court by July 1, 2004. The State is required to attend periodic status conferences describing its progress in implementing these massive changes. The March 1, 2004 conference included discussion concerning the pending changes, and the timing of their becoming effective.

The changes to the revocation system, i.e., staffing, supervision, and budget require immediate action on numerous policies, including this regulation package. The elimination of the current appeals system streamlines the revocation system by eliminating a step that frustrates the inmate/parolee and duplicates existing judicial processes, and in many cases delays ultimate relief. Fairness requires that the Board treat all inmates and parolees fairly, thus the appeals process is being eliminated for other Board proceedings, e.g., life prisoner hearings, mentally disordered offender hearings, sexually violent predator determinations and other miscellaneous proceedings. A grievance procedure is being retained for qualified inmates/parolees since it is mandated by the ADA and the *Armstrong* injunction.

It would not be feasible for the Board to promulgate, nor for the public to comment and the Board to consider comments on every aspect of this complex plan at any one time. Therefore, this regulation package is part of the initial group of changes. The Board contemplates that additional packages will be issued in groups approximately monthly. This coincides with its monthly public Board meetings where the formal adoptions take place.

The Board estimates the cost for Board staff, private attorneys for parolees, together with the cost of the other sweeping changes to the process will be in the range of \$50 million. The State is facing unprecedented financial difficulties. This \$50 million funding target cannot be met unless existing processes are streamlined and redundant functions eliminated.

The Board has considered but declined to implement a number of alternatives it deems to be less satisfactory in addressing the above legal issues. The main alternative to implementation of the VRP is reneging on the settlement agreement and accepting the court's original July 23, 2003 order. The Board estimates that the cost of compliance with that earlier order is in the range of \$100 million. Another alternative is that the State delay implementation of some or all of the VRP in order to save money. The danger is that the State, and its elected and appointed officials, may be held in contempt of court or fined. Eventually, the federal court could appoint a Special Master to run California's parole revocation system. These options would likely be the most costly, with the State losing almost all control of both public safety and finances. The last option—elimination of parole—would have a significant impact on public safety; it would require formal enactments by the California Legislature. Given the

onerous or speculative alternatives, immediate action on the proposed regulations is a necessary part of defending the State from these significant perils. In summary, the Board has determined that no reasonable alternative identified or considered would be more effective in carrying out the purpose for which the action is proposed, or would be as effective as and less burdensome to affected private persons than the proposed regulatory action.

Some aspects of restructuring the Board's programs also result from the dire State budget deficits. While the Governor's latest proposals in January 2004 reduced the Board's total budget over 15% from FY 2002-2003 levels, certain fixed costs necessitated disproportionate staffing reductions. While essential functions mandated by law must be delivered, the form and manner in which services are delivered remains in flux. Some of the changes reflect reallocations of staff. The Board projects these regulation changes will yield a net reduction of 2.2 Deputy Commissioners and 0.7 Office Technician positions in Fiscal Year 2005/2006; the net savings is \$415,730. In terms of economic impact on the public, the Board notes that no cost impacts on a representative private person or business would result from the proposed action. The forthcoming "Notice of Proposed Action" will discuss in detail the cost impacts of this regulatory action matters.

The Board knows that the public's broader interest and the changes necessary under the *Valdivia* Order will be better served by an all inclusive review of BPT decisions and that the quality of Board decision making, as well as public safety policy, can be improved. This regulatory action will facilitate redirection and training of an expanded quality control function.

The Board intends that these amendments take effect on May 1, 2004, on an emergency basis, until made permanent under appropriate procedures. Given the time frames imposed under the *Valdivia* Order, the regular process for adopting regulations under the Administrative Procedure Act would not be sufficient or effective.

## **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

Penal Code § 3052 vests with the Board the authority to establish and enforce rules and regulations under which prisoners committed to state prisons may be allowed to go upon parole outside of prison when eligible for parole.

Penal Code § 5076.2 authorizes the Board to promulgate, maintain, publish, and make available to the general public, a compendium of its rules and regulations.

Existing regulations, CCR §§ 2050 through 2057 set out the administrative appeals process whereby "[a]ny person under the Board's jurisdiction may appeal any decision of the Board which affects that person . . . ."

*In re Muszalski* (1975) 52 Cal.App.3d 500, recognized that agencies "should be given a chance to discover and correct its own errors," i.e., administrative appeals, but in doing so, must provide a means for prisoners and parolees to exhaust their administrative remedies before they can sue for relief in the California courts.

The permanent injunction issued in *Armstrong v. Schwarzenegger* [USDC-ND, Case No. C-94-02307], ordered the Board to provide effective assistance to parolees and prisoners who could not understand the appeals process. In addition, the court ordered that Americans With Disabilities Act (ADA)-related appeals be decided within 30 days. In addition, the court ordered the Board to implement a grievance procedure for the processing of complaints of denials for requests for accommodations. Accommodations for prisoners or parolees with disabilities are currently addressed in CCR § 2057.

The Board proposes to repeal the Administrative Appeals regulations and make other related changes for the reasons addressed in the Finding of Emergency, set forth above.

## **LOCAL MANDATES**

The Board has determined that the proposed action imposes no mandate upon local agencies or school districts.

## **FISCAL IMPACT STATEMENT**

- Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630:  
*None*
- Cost or savings to any state agency:  
*The Board estimates that it will not incur cost savings in the current fiscal year due to the transition of its processes; however, in Fiscal Years 2004-2005 and 2005-2006, and successive Fiscal Years, the Board estimates cost savings in the amount of \$415,730.*
- Other non-discretionary cost or savings imposed on local agencies:  
*None*
- Cost or savings in federal funding to the state:  
*None*